

Durham Research Online

Deposited in DRO:

06 March 2012

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Baker, Aaron (2008) 'Proportionality and employment discrimination in the UK.', *Industrial law journal*, 37 (4). pp. 305-328.

Further information on publisher's website:

<http://dx.doi.org/10.1093/indlaw/dwn016>

Publisher's copyright statement:

This is a pre-copy-editing author-produced PDF of an article accepted for publication in *Industrial law journal* following peer review. The definitive publisher-authenticated version Baker, Aaron (2008) 'Proportionality and employment discrimination in the UK.', *Industrial law journal*, 37 (4). pp. 305-328 is available online at:
<http://dx.doi.org/10.1093/indlaw/dwn016>

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

Proportionality and Employment Discrimination in the UK

By Aaron Baker*

Abstract

This paper argues that the justification defence in UK statutory indirect discrimination cases should incorporate proportionality as applied by the European Court of Human Rights (ECtHR). It first analyses the evolution of the UK approach to proportionality before the enactment of the Human Rights Act 1998 (HRA), when its primary influence was the jurisprudence of the European Court of Justice (ECJ) applying EC equal treatment directives. This assessment shows that the UK judiciary was already adopting an approach to proportionality at odds with that of the ECJ, and more resonant with that of the ECtHR. An evaluation of UK practice, however, including consideration of GMB v Allen, shows that UK judges do not apply the rigorous scrutiny required by either the ECJ or ECtHR approaches. The article considers the doctrine of proportionality as developed through the discrimination jurisprudence of the ECtHR, and its application under the HRA. Given the increasing relevance of ECHR precedent under the HRA, the article evaluates how the influence of Strasbourg teaching can (and should) enhance the UK approach to the resolution of employment discrimination claims.

Introduction

Proportionality plays an increasing role in employment anti-discrimination law in the UK, in great part as a result of the directives based on Article 13 of the EC Treaty.¹ Those directives have led to the adoption of measures prohibiting employment discrimination on the grounds of sexual orientation, religion or belief, and age, as well as to the amendment of existing statutory protections based on race, gender, and disability. These EC-driven provisions have incorporated ‘genuine occupational requirement’ (GOR) and justification defences that turn ultimately on a proportionality test.² At about

* Senior Lecturer in Law, Durham University, United Kingdom; admitted to practice in Illinois, Missouri, and before the U.S. Federal Courts. I would like to thank the United Kingdom Arts and Humanities Research Council for its support, in the form of a research leave grant, of the preparation of this article.

¹ Council Directive No. 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, etc (as amended by Directive 2002/73); Council Directive No. 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.

² Sex Discrimination Act 1975 s 1(2)(b); Race Relations Act 1976 ss 1(1A) & 4A(2); Employment Equality (Religion or Belief) Regulations 2003 ss 3(1)(b) & 7(2); Employment Equality (Sexual Orientation) Regulations 2003 ss 3(1)(b) & 7(2); Employment Equality (Age) Regulations 2006 ss 3(1)(b) & 8(2).

the same time, the Human Rights Act 1998 (HRA), by applying European Convention on Human Rights (ECHR) protections in UK law, has made proportionality a common doctrine in UK courts, where it had previously been a relative stranger. This means that the measures implementing the Article 13 EC directives are finding their feet at a time when UK judges are just beginning to get their hands dirty with the mechanics of the proportionality doctrine. This period of invention-by-necessity, fuelled by the usually extensive amount of anti-discrimination litigation in the UK, has confronted judges and tribunal chairs with a steep learning curve over the application of proportionality in employment discrimination law.

There remains a great deal for them to learn. This article analyses the evolution of the UK approach to proportionality before the enactment of the HRA, when its primary influence was the jurisprudence of the European Court of Justice (ECJ) applying EC equal treatment directives. This assessment shows that the UK judiciary was already adopting an approach to proportionality at odds with that of the ECJ, and more resonant with that of the European Court of Human Rights (ECtHR). The article then considers the doctrine of proportionality as developed through the discrimination jurisprudence of the ECtHR, and its application under the HRA. Given that section 3 of the HRA can require that domestic anti-discrimination laws be interpreted consistently with ECHR rights and freedoms, the paper argues that the Strasbourg teaching can (and should) enhance the UK approach to the resolution of employment discrimination claims.

Proportionality in UK and EC Employment Discrimination Law

Proportionality is a concept that has been well developed in Europe, but incorporated in U.K. adjudication only grudgingly, and often because European obligations required it.³ Although British courts have flirted with proportionality in their judicial review jurisprudence,⁴ the primary role of proportionality outside the ECHR and the HRA has been in areas heavily influenced by European Community law, such as indirect discrimination.⁵ Indirect discrimination involves a claim, for example under the Race Relations Act 1976 (RRA), that a facially neutral rule ('a provision, criterion, or practice') imposes greater burdens ('a particular disadvantage') on persons of the claimant's race than on other people. Proportionality comes into play because the RRA and similar statutes allow defendants to 'justify' indirect discrimination by way of a form of proportionality defence. The defence typically requires that the employer's aim be legitimate, and the means to achieve it proportionate.⁶ This of course begs the question of under what circumstances a rule or policy represents a proportionate means to a legitimate aim.

The justification defence existed in domestic law even before ECJ interpretations of EC Article 141—the provision that guaranteed equal pay between men and women

³ *R (Daly) v. Home Secretary* [2001] UKHL 26, paras. 26, 27, 32; *R (Brind) v. Home Secretary* [1991] 1 AC 696, 766-767; M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998).

⁴ *R (Pegasus Holdings (London) Ltd) v. Transport Secretary* [1988] 1 WLR 990.

⁵ *Allonby v. Accrington and Rossendale College* [2001] IRLR 364, paras. 23-29; Evelyn Ellis, 'Proportionality in European Community Sex Discrimination Law' in *The Principle of Proportionality in the Laws of Europe* (Evelyn Ellis (ed), Oxford: Hart Publishing, 1999), 170-172.

⁶ See, eg, Sex Discrimination Act 1975 s 1(2)(b).

well before the Article 13 directives came onto the scene—began to shape the UK jurisprudence. As early as the 1970s disagreements had arisen over whether, under the RRA and the Sex Discrimination Act 1975 (SDA), justification required that the employer show the ‘necessity’ of the indirectly discriminatory rule. In an early SDA case the Employment Appeal Tribunal (EAT) insisted that justification could only be claimed by ‘the need, not the convenience, of the business.’⁷ By 1980, however, the Court of Appeal in an RRA case saw no need to consider the availability to the employer of less discriminatory rules in holding that a ban on beards was justified on grounds of hygiene, even where the rule appeared to allow other facial hair besides beards.⁸ Not long after, the Court of Appeal in *Ojutiku v Manpower Services Commission* made its position clearer by saying that justification ‘clearly applies a lower standard than the word “necessary,”’ and concluding that justification only requires reasons ‘which would be acceptable to right-thinking people as sound and tolerable reasons.’⁹

Judges resisted the word ‘necessary’ because it implied that the indirectly discriminatory rule or policy was the *only* way the employer could achieve a legitimate aim. If an employer can achieve its legitimate objective with a rule that has less of a discriminatory impact than the rule under challenge, then the latter can hardly be called ‘necessary.’ The UK courts in the first decade of the SDA and RRA clearly did not want to apply such a ‘least restrictive means’ test to employers. However, this position came under pressure when, in the *Bilka-Kaufhaus* case, the ECJ ruled that indirect discrimination under Article 141 EC could satisfy the justification defence only where it ‘correspond[s] to a real need on the part of the undertaking’ and is ‘necessary.’¹⁰ At the time, this decision was binding as to the Equal Pay Act 1970 (EqPA), which made it presumptively applicable to the SDA, but not necessarily the RRA.¹¹ Because the *Ojutiku* approach was ‘of little help’ in the face of the *Bilka* guidance, the Court of Appeal in *Hampson v Department of Education and Science* had to find a way to reconcile avoidance of a ‘least restrictive means’ test with the ECJ’s enshrinement of the word ‘necessary.’¹²

Although *Hampson* was subsequently overruled by the House of Lords on other grounds, where the Lords eschewed the justification issue altogether, the ratio of the Court of Appeal was later expressly approved by the House of Lords in *Webb v EMO*.¹³ In *Hampson* the court held that justification under the RRA ‘requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.’¹⁴ On its face this kind of test should have made it possible for particularly strong discriminatory effects to outweigh even ‘necessary’ rules or policies (this implication receives more attention below). However, the court in *Hampson* almost certainly had a different side of the equation in mind. The balancing approach would allow judges to apply a test not blatantly inconsistent with *Bilka*’s ‘real need’ and ‘necessary’ language—because it appeared to define ‘necessary’ as meaning

⁷ *Steel v Union of Post office Workers* [1978] ICR 181, 188.

⁸ *Panesar v Nestle Co Ltd* [1980] ICR 144, 146-147.

⁹ *Ojutiku and Oburoni v Manpower Services Commission* [1982] ICR 661, 667-668.

¹⁰ *Bilka-Kaufhaus Case C-170/84* [1987] ICR 110, 126.

¹¹ *Schiels v Coombs* [1978] ICR 1159, 1165-1169.

¹² *Hampson v Department of Education and Science* [1989] ICR 179, 190-191.

¹³ [1993] ICR 175.

¹⁴ *Hampson* [1989] ICR 179, 191-192.

‘when reasonable needs outweigh discriminatory effect’—while avoiding a least restrictive means test. Balancing enabled a court or tribunal to find some variable in the case, such as legitimate aim or discriminatory effect, of a sufficiently high or low weight to excuse it from exploring whether there were less restrictive means available to the discriminator.

Hampson illustrates how UK courts reached for a flexible approach when the more structured ECJ approach required them rigorously to second-guess the means by which employers pursued their objectives. How the UK judiciary responded to *Enderby v Frenchay Health Authority* offers another demonstration of how keen courts were to avoid getting pinned down by the clarity of a least restrictive means test.¹⁵ The ECJ in *Enderby* rejected the EAT’s approach to justification in an EqPA case—the EAT had found an entire pay differential justified, but only a proportion of the differential was actually necessitated by market forces—because it allowed some discriminatory impact that could have been avoided, and was not therefore shown to be necessary. In short, the result reiterated that ‘necessary’ meant that no justification would succeed where a less discriminatory alternative was available. In reaching this result, the ECJ reminded the UK courts that they must apply the principle of proportionality in UK law. It was this reminder that Lord Nicholls, in the leading House of Lords speech in *Barry v Midland Bank*, relied on to claim that *Enderby* stood for the following proposition:

[T]he ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact on women or men, as the case may be, the more cogent must be the objective justification.¹⁶

Lord Nicholls went on to opine that once the employer’s objective had been found ‘legitimate,’ the policy in question was justified so long as it was needed to achieve the objective: he expressly rejected the idea that a policy could be challenged on the ground that the aim it served did not correspond to the needs, as opposed to the convenience, of the business.¹⁷ This contradicted the clear statement in *Bilka* that only a measure *necessary* to meet a *real need* of the employer can outweigh a discriminatory impact.

To understand what the Lords did in *Barry* requires an appreciation of the variety of ways in which the principle of proportionality can be expressed. Proportionality comes to European jurisprudence through German law, which developed a doctrine of proportionality requiring that state acts or measures be (1) suitable to achieve a legitimate purpose, (2) necessary to achieve that purpose, and (3) proportional in the narrower sense: they must not impose burdens or ‘cause harms to other legitimate interests’ that outweigh the objectives achieved.¹⁸ ‘Proportionality in the narrower sense’ (proportionality *stricto sensu*), became the foundation of the Article 14 ECHR analysis in

¹⁵ *Enderby v Frenchay Health Authority* Case C-127/92 [1994] ICR 112, 129-130, 163.

¹⁶ *Barry v Midland Bank* [1999] ICR 859, 870-872.

¹⁷ *Ibid.*

¹⁸ Lord Hoffmann, ‘The Influence of the European Principle of Proportionality upon UK Law,’ in *The Principle of Proportionality in the Laws of Europe* (Evelyn Ellis ed, 1999), 107. Lord Hoffmann is a Law Lord in the UK House of Lords.

the *Belgian Linguistics* case, which was in fact the first mention of the doctrine of proportionality by the ECtHR.¹⁹ This basic European principle of proportionality requires that invasions of a right impose no greater restrictions on the right (or on ‘rights interests’) than can be balanced out by the need of the state to invade the right; the state’s ‘need’ refers not only to the importance of the objective but to the ‘need’ for the particular means employed to achieve it. This principle constitutes proportionality in its ‘strict sense,’ while more complicated formulations are essentially structured analyses intended to ensure the observation of the principle.

Proportionality *stricto sensu* is also included in the ECJ understanding of justification of indirect discrimination, but is far less emphasised owing to *Bilka*’s adoption of a structured analysis involving ‘real need’ and necessity.²⁰ Such a test rests on a presumption that a discriminatory impact has substantial ‘weight’ in the balancing exercise. A justification cannot outweigh this impact unless at least (a) the business has a real need to achieve a particular aim, and (b) the measure it employs to achieve it is necessary, in the sense of representing the least restrictive alternative. Nothing in *Bilka* suggests that the test deprives a court of the option of finding that a measure which meets those criteria nevertheless fails to satisfy proportionality *stricto sensu*. Since 1997, after *Bilka*, Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (among other directives) has specified that indirect discrimination can be justified only where a challenged rule is ‘appropriate and necessary.’ This illustrates yet another mode of expressing the principle of proportionality. Subsequent ECJ decisions have made it clear that this facially less demanding language must be applied consistently with the *Bilka* requirements.²¹ Thus the ECJ approach to proportionality, at least with regard to the justification of indirect discrimination, guarantees proportionality *stricto sensu* by requiring a level of scrutiny that goes beyond striking an ad hoc balance, in effect giving discriminatory impact a presumptively high weight by approving as justified only means necessary to meet a real need of the business.

In that light, Lord Nicholls’s speech in *Barry* shows a lot of cheek. *Enderby* treated the failure to employ the ‘least restrictive alternative’ in the case before it as precluding a finding of proportionality, and then reminded courts to apply proportionality. The House of Lords responded by (1) extracting the little-relied-on balancing part of the ECJ conception to (2) justify ignoring the far more demanding tests imposed in *Bilka* (including least restrictive alternative) and (3) failing to replace the *Bilka* presumptions with a proper *stricto sensu* analysis assigning a meaningful weight to discriminatory impacts. As a result, at least as late as *Barry* (decided just before the HRA came into effect) the UK judiciary embraced the idea of balancing impacts against justifications as a poor substitute for—and perhaps as a means of distracting observers from the subversion of—the real need and necessity standards required by the ECJ.²²

¹⁹ *Belgian Linguistics* (1968) 1 EHRR 252, para 10; M.-A. Eissen, ‘The Principle of Proportionality in the Case Law of the European Court of Human Rights,’ in *The European System for the Protection of Human Rights* (R St J Macdonald, F Matscher & H Petzold eds, 1993), 140.

²⁰ *Cadman v Health and Safety Executive* [2006] ICR 1623, 1635-1639, 1647 (the ECJ referred specifically to the paragraph of *Bilka* which required that the policy correspond to a ‘real need’ of the business).

²¹ See, eg, *ibid*.

²² It is acknowledged that recent cases suggest that the ECJ itself does not always strictly adhere to the idea that a legitimate aim must correspond to a real need of the employer, but the point here is to observe how UK cases have skirted the issue.

UK Proportionality in Practice

The sad irony of the foregoing stems from the fact that discrimination claimants in the UK never get the part of proportionality that might compensate them for the loss of the necessity test. Proportionality *stricto sensu* should mean that very weighty impacts might override even a rule or policy found necessary to achieve a legitimate aim. However, UK judges have consistently treated proportionality balancing as if it means only that if the employer can point to strong enough reasons, even an ‘unnecessary’ rule can be justified, but never the other way around. It is nearly impossible to find a UK employment discrimination decision where the impact of the discrimination is measured or weighed at all. A good illustration comes from the post-*Bilka* case of *Board of Governors of St Matthias Church v Crizzle*, where the EAT (Wood, J.) found indirect discrimination against an applicant for a head teacher position justified on the facts.²³

The School had advertised a head teacher post with the requirement that the applicant be a ‘communicant’ in the Church of England or the Catholic Church, so that he or she could lead the morning assemblies in prayer. The claimant, an Asian woman who was not a communicant but was otherwise a well-qualified member of the Church, demonstrated that a much smaller proportion of Asians could satisfy the communicant requirement than could whites. The EAT set out the following test, the satisfaction of which would allow the School to justify the indirect discrimination:

- (a) Was the objective of the governors a legitimate objective (it is not for the Industrial Tribunal to redraft or redefine the objective)? In the present case it was to have a headteacher who could lead the school in spiritual worship and in particular the administering of the sacrament at the weekly mass to those who were confirmed. The headteacher should have full membership of the Church in order to foster the Anglo-Catholic ethos of the school.
- (b) Were the means used to achieve the objective reasonable in themselves? and
- (c) When balanced on the principles of proportionality between the discriminatory effect upon the applicant's racial group and the reasonable needs of the governors, were they justified?²⁴

In response to the complaint that the school had defined its ‘legitimate objective’ in such a way that the objective differed in no meaningful way from the means adopted to meet it, the tribunal below had found that the ‘legitimate objective’ should have been that of blending an ‘Anglo-Catholic ethos’ with efficient education (an objective for which one might say the school had a ‘real need’), and that therefore the means (requiring a communicant head teacher) was a mere preference and hence not reasonable.²⁵ The EAT rejected this finding, and based its entire justification analysis on assessing the extent to which the rule in question suited the schools own statement of its aims. Naturally, once

²³ [1993] IRLR 472 at 475.

²⁴ Ibid.

²⁵ Ibid at 476.

the school's preference for a prayer-leading head teacher was accepted as 'legitimate' the requirement of a prayer-leading qualification was found reasonable. Not a word was written on the subject of the impact of the discrimination on the claimant, or upon the local Asian community, or upon relations between whites and Asians in the local community. In other words, the tribunal treated the 'discriminatory effect' from element (c) as if it had an assumed—and fairly minimal—weight. The EAT opinion left the impression that although indirect discrimination was bad, the weight of its badness could never be great enough to outweigh a legitimate objective, reasonably pursued.

Under this kind of analysis the cards could not be more relentlessly stacked against the claimant. The employer need not satisfy *Bilka*'s necessity requirement, so the justification succeeds regardless of the availability of less discriminatory means. Of course, the availability of less restrictive means is merely hypothetical, because the employer also faces no 'real need' requirement, so is free to define its objective as more or less identical with the criterion it seeks to apply, without showing a real need for it. Thus in *Crizzle* the school avoided having to defend its decision that the interests of the students and the ethos of the school could not be served by any other means than by the head teacher—nobody else would do—leading the school in prayer. Once the tribunal accepted this as 'legitimate,' the game was over, because the objective could only possibly be achieved by requiring that the head teacher have the credentials prerequisite to performing that function. The *Crizzle* analysis could redeem itself, however, through proportionality *stricto sensu*. A proper balancing might find that the absence of a real need for the particular policy adopted would place a very low weight on the employer's side of the balance, enabling evidence of the discriminatory effects of the policy, on the students, the claimant, and the community, to outweigh the justification. Alas, that part of the analysis was mere chimera.

Crizzle-style curtailed proportionality typifies UK justification inquiries in indirect discrimination cases. There was a brief ray of hope, however, in the Court of Appeal decision in *Allonby v Accrington and Rossingdale College*.²⁶ In this case, decided, interestingly, on the heels of the coming into force of the HRA, the court noted that *Barry* was not the only authority on the application of proportionality. Following ECJ guidance *Allonby* held that the decision of the tribunal below, that 'sound business reasons' amounted to a justification, could not stand. The court held that justification required 'a critical evaluation of whether the [employer's] reasons demonstrated a real need . . . ; if there was such a need, consideration of the seriousness of the disparate impact . . . on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.'²⁷ Note that now 'real need' has been reinstated, but there is no requirement that the challenged rule be necessary to meet that need. The result is a more effective formulation than in *Crizzle*, but not one that brings the UK justification analysis in line with that of the ECJ.

The best part of the *Allonby* formulation is its reference to weighing the disparate impact against the employer's need. This properly draws attention to the effects of discrimination, and appears to offer claimants at least one of the benefits of proportionality in partial compensation for their loss of the necessity requirement. However, *Allonby*'s admirable expression of proportionality *stricto sensu* was not,

²⁶ [2001] ICR 1189.

²⁷ *Allonby v Accrington and Rossingdale College* [2001] ICR 1189, 1201.

unfortunately, accompanied by any guidance on how impacts are to be weighed. Moreover, its mode of expression—‘whether the former [the employer’s need] were sufficient to outweigh the latter [discriminatory impact]’—reinforces the assumption that ‘outweighing’ only goes in one direction. Probably as a result, cases since *Allonby* generally involve no more weighing of impacts than *Crizzle*.

A stark example of this phenomenon is *GMB v Allen*.²⁸ That case involved a situation where a planned job evaluation scheme would demonstrate that several women workers had been underpaid for years, and several other employees, mostly men, had been overpaid. In other words, some women would wind up reclassified upward, and have EqPA claims for past underpayment, while several men (a much greater proportion of the GMB union’s membership) would be reclassified down, and face pay cuts. The GMB pressured female union members to take risible settlements of their equal pay claims, in order to leave the employer enough money to grant better concessions to protect the pay of those reclassified downward. The Employment Tribunal (ET) found the union’s bargaining policy indirectly discriminatory against women, and applied a justification test that called for the policy to pursue a legitimate aim through proportionate means.²⁹ Because it did not follow the *Bilka* or *Allonby* requirements of a ‘real need’ for the challenged policy, the ET found the aim of the policy—‘to avoid or minimise “losers”’ in the pay reclassification—legitimate. Nevertheless the ET found that the means—failing to push the equal pay claims harder and using ‘spin’ to get women to agree to the settlements—were not proportionate. This conclusion did not rest on a weighing of the impacts of the union’s bargaining conduct, but on the assumption that it could never be proportionate for the union ‘to procure the acceptance or acquiescence of [the women with EqPA claims] by a marked economy of truth in what it says and writes to them.’³⁰

On appeal the EAT found the discrimination justified, and did not replace the ET’s ‘legitimate aim’ test either with a ‘real need’ requirement or the weighing of impacts called for by proportionality *stricto sensu*. There are too many things wrong with this decision to mention them all here. For the purposes of this paper it suffices to discuss the EAT’s reliance on *Barry* (not *Allonby*) for the proposition that once the aim has been accepted as legitimate, then any means necessary to meet that end are justified.³¹ We must leave aside for another paper whether it could ever be a legitimate objective intentionally to favour, in collective bargaining, the interests of mostly male reclassified employees over the interests of exclusively, and not accidentally, female employees with EqPA claims: the tribunal below had conceded the legitimacy of this aim as an issue of fact. This finding ignored, of course, the commands of both *Bilka* and *Allonby* that the respondent show a ‘real need,’ not merely a ‘legitimate aim.’ The EAT could hardly fail to have reached a different result had GMB been required to prove a real need for its discriminatory bargaining position. With only a legitimate aim to worry about, the EAT suddenly did not so much mind using the necessity test that UK judges usually resist. It held that the objective at issue could only be achieved through the means employed: pressuring—even by unlawful or deceitful means—women union members to sacrifice

²⁸ [2007] IRLR 752.

²⁹ *GMB v Allen* [2007] IRLR 752, 760.

³⁰ *Ibid.*

³¹ *Ibid.*, 761.

their claims. At no point did the EAT even mention, much less weigh or balance, the impact of such a collective bargaining policy on the women claimants, on women in the union other than the claimants, or on gender equality in the workplace.

Although the Court of Appeal subsequently rejected the EAT ruling and reinstated that of the ET, no effort was made to correct or strengthen the analysis used.³² The opinion observed that the EAT incorrectly discounted the ET's finding, that the union's use of 'spin' amounted to a disproportionate means, because the EAT assumed that this conduct was not really a part of the relevant means.³³ This very technical decision corrects one crucial transgression of the EAT—the suggestion that *any* means necessary to a legitimate aim is proportionate. However, it appears to go no further than to say that a tribunal may find that employing dishonesty as a means to a legitimate aim is disproportionate. It leaves in place a test that (1) does not require a 'real need' for the discriminatory policy and (2) fails to acknowledge that not all 'legitimate aims' are created equal. Because the proportionality analysis that remains does not involve a step where impacts are weighed, then weak aims like that of the union can still pass muster as long as the aim cannot be realised through less discriminatory means, and the means do not involve outright dishonesty.

One telling implication of this case is that while UK judges embrace balancing in order to avoid being *required* to apply a necessity test, when the facts appear to indicate that the means were necessary, balancing goes out the window. It is difficult to avoid the conclusion that the domestic judiciary's discomfort with second-guessing lawmakers and decision makers leads it to shut its eyes to impacts. Although it flouted *Allonby*, the EAT decision in *Allen* did not stray far from the spirit of *Ojutiku*, *Hampson*, *Barry*, and *Crizzle* in finding that even the clearly egregious impacts of the devious union behaviour could never actually outweigh a necessary means to a legitimate aim. This is true even though one gets the impression the EAT were holding their collective noses while treating the union's aim as 'legitimate.'³⁴ Proportionality is in a parlous state indeed if a barely legitimate aim, unlawfully and deceitfully pursued, is not even considered a candidate for being outweighed by obviously unfair discriminatory impacts and the reinforcement of long-term discrimination by an employer.

The Influence of the HRA

The introduction of Article 14 ECHR into UK courts through the HRA, however, should in theory have improved the environment for receptivity to a proper proportionality balancing. By its terms the HRA openly embraces the part of proportionality from which judges traditionally shrink: it asks courts, when necessary, to substitute their judgment for that of the original decision maker on the question of compatibility with Convention rights.³⁵ If the HRA requires courts to engage in a fresh proportionality inquiry to

³² *GMB v Allen* [2008] EWCA Civ 810, [18]-[34].

³³ *Ibid*, [29]-[30], [33].

³⁴ *GMB v Allen* [2007] IRLR 752, 761-762.

³⁵ See, eg, F. Klug, 'The Human Rights Act—A "Third Way" or "Third Wave" Bill of Rights,' [2001] *EHRLR* 361; I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg,' [2002] *PL* 265, 282-286; J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review,' [2000] *PL* 671; M. Elliott, 'The HRA 1998 and the Standard of Substantive Review,' 60 *CLJ* 301 (2001); P. Craig, *Administrative Law* (4th ed, 1999) 546, 556-557, 561.

determine whether a state measure violates an ECHR right (in cases involving those rights qualified by proportionality), one would expect this to remove much of the legitimate ‘judicial restraint’-based resistance to a searching assessment of benefits and impacts. Debate obviously persists over the extent to which judges should defer to lawmakers with regard to issues falling within their expertise or majoritarian remit. However, there can be no doubt that the HRA has increased the intensity of review beyond the *Wednesbury* standard that applied in pre-HRA judicial review cases.³⁶ Section 6 HRA makes it ‘unlawful for a [court] to act in a way which is incompatible with a Convention Right,’ without express authority from Parliament. This means that institutionally the courts have the final word, because they have the last chance to prevent Convention-incompatible state actions, and the duty to do so.

This institutional position as the last bastion of rights enforcement should by itself embolden courts to perform an independent assessment of proportionality. However, the HRA provides even more explicit direction. Although courts are bound to apply Parliamentary statutes, s 3(1) HRA requires judges, ‘so far as it is possible to do so’ to read and ‘give effect’ to legislation, regulations, or decisions in a way compatible with Convention rights, even where a natural reading of the law would violate the Convention. Where a measure cannot be read in a Convention-compatible way without going against the manifest intent of Parliament, s 4 HRA requires that the court issue a ‘declaration of incompatibility,’ meaning that the court will apply the statute as written, but substantial political pressure will exist for Parliament to amend the offending statute (although it is not obliged to do so). Courts are empowered essentially to change the effects of measures—amend them from what they would have been upon a natural reading—unless the offending effects were consciously intended by Parliament, in which case they are to tell Parliament if they think it struck the balance incorrectly.³⁷ This means that judges have been expressly instructed to make a determination as to whether Article 14 ECHR, for example, *has been violated*, not whether Parliament or an executive decision maker reasonably thought they were acting consistently with Article 14. They can only perform this task by engaging in a factual evaluation of the weight of the state interest as balanced against the weight of the rights interest. This leaves no excuse for ‘restraint’ other than in matters of deference to expertise or majority policy choice.

In light of this, the HRA provides a natural and logical opportunity to enhance the application of proportionality in domestic anti-discrimination law. I call this opportunity ‘natural’ for three reasons. First, it seems inevitable that judges will begin to view proportionality generally in the way that they find themselves so often applying it under the HRA, which should translate into increasing confidence with second-guessing decision-makers. Second, as is set out more fully below, the Strasbourg test for proportionality under Article 14 sounds much more like the version set out in *Hampson* and *Allonby* than the necessity tests of *Bilka* and *Enderby*, and therefore seems a fitting source of guidance in fleshing out the UK understanding. Third, under the HRA Article 14 can apply to any statutory discrimination case involving inequality in the enjoyment of a Convention right. That could include, among others, cases involving sexual orientation

³⁶ *R (Daly) v. Home Secretary* [2001] UKHL 26, paras. 26, 27, 32; *R (Brind) v. Home Secretary* [1991] 1 AC 696, 766-767; M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998).

³⁷ A. Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998,’ 24 *OJLS* 259, 274-277 (2004).

discrimination (privacy under Article 8), religious discrimination (freedom of religion under Article 9) or discrimination by one's union as in *Allen* (freedom of association under Article 11). In such cases s 2(1) HRA requires the tribunal to 'take account of' the ECtHR approach to proportionality, and UK courts have generally been inclined to follow Strasbourg precedent in the absence of a compelling reason not to. In practice, this should mean that where Article 14 applies, tribunals will interpret the indirect discrimination justification defence consistently with Strasbourg teaching on proportionality.

Of course, the domestic judiciary are perfectly capable of passing up a natural and logical opportunity. They should seize this one, however, because (1) the current departure from ECJ authority is not sustainable, (2) moving closer to the Strasbourg approach will do less violence to existing domestic precedent and (3) a robust balancing (*stricto sensu*) model should be enough to make an express reconciliation with *Bilka* unnecessary. As to the first point, even though the EAT decision in *GMB v Allen* was reversed, at the time of writing the GMB union was determined to take the case to the House of Lords.³⁸ The EAT's reasoning was not far out of step with the run of UK opinions, and *Allen* will certainly not be the last case in which a job evaluation scheme pits equal pay claims against the interests of the core members of a large union.³⁹ A correction of some kind must occur, leaving only the question whether the UK courts will eat humble pie (under the duress of an ECJ judgement or otherwise) or find a more graceful way to close the gap. If they choose to cleave to the *Bilka* test, they must back-pedal through a carefully chicaned line of cases. On the other hand, a move toward the ECtHR approach could develop more smoothly from the seed of balancing planted in *Hampson*. Although *Hampson* itself does not satisfy ECJ requirements, the Strasbourg approach can, because the *Bilka* test employed a set of presumptions—real need and necessity—to assure the satisfaction of proportionality *stricto sensu*.⁴⁰ In other words, the ECJ is unlikely to view the *Bilka* test as substantively different from the ECHR understanding of proportionality; instead, it is a structured analysis employed to ensure the full application of the principle. Thus, a full and rigorous ECtHR-style approach to proportionality should satisfy the ECJ. UK judges can, and should, bring their jurisprudence in line with the European principle of proportionality by following the more intuitive and flexible Strasbourg teaching.

Strasbourg on Article 14 Justification

Article 14 reads, in total:

The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language,

³⁸ See GMB website, <http://www.gmb.org.uk/Templates/PressItems.asp?NodeID=97244> (last checked 17 July 2008).

³⁹ See, eg, M. Herman, 'Unions Discriminated Against Female Workers, Court Rules,' *TimesOnline*, 16 July 2008 (<http://business.timesonline.co.uk/tol/business/law/article4344656.ece> last checked 17 July 2008).

⁴⁰ *Cadman v Health and Safety Executive* [2006] ICR 1623, 1635-1639, 1647.

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Demonstrating discrimination on a covered ground, in the enjoyment of another convention right, constitutes a *prima facie* Article 14 case, which the state can rebut by offering a justification.⁴¹ The state bears the burden of proving the proportionality of the measure under challenge.⁴²

A *prima facie* case of Article 14 discrimination first asks whether the alleged discrimination affects the equal enjoyment of another Convention right. This inquiry into whether the facts fall within the ‘ambit’ of other Convention articles acts as a substantial gatekeeper for discrimination claims, albeit less harshly in Strasbourg than in the UK.⁴³ A second element calls for the case to turn on a covered ground of discrimination. The grounds of discrimination covered by the article are not unlimited, but they appear to include any personal characteristic that amounts to a ‘status,’ including those resulting from personal choices, like former membership in the KGB, or pursuing a career as a lawyer.⁴⁴ A third step, the requirement of less favourable treatment than an analogous comparator, is often not mentioned by the ECtHR, and clearly comes into play only when required by a case where the true ‘but for’ cause of the differential treatment is difficult to identify.⁴⁵ Lord Walker in *Carson v Secretary for Work and Pensions* quoted the observation of van Hoof and van Dijk that the ECtHR tends to ‘gloss over’ the comparability test and let cases turn on the final step of justification.⁴⁶

Since 1968 the justification inquiry has depended on the application of the principle of proportionality to each case: distinctions must ‘strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.’⁴⁷ Thus, whether a case involves a distinction on the basis of, for example, sex or property (both specifically listed in Article 14), the Strasbourg Court will apply proportionality to determine whether the interference with the enjoyment of Convention rights outweighs the state’s need for applying the distinction. Because gender distinctions cause harms to society independent of the specific facts of the case, harms such as undermining respect for the law and fostering social exclusion, the Court applies proportionality to such distinctions with a substantial weight already on the impact side of the scale, before any specific experiences of the claimant or her community come into the analysis. As a result, the state must offer ‘very weighty reasons’ to justify a gender classification: this is seldom (but not never) possible.⁴⁸ With a distinction on the basis of property, on the other hand, the Court puts on the impact side of the balance only what the evidence supports. This can nevertheless

⁴¹ *Belgian Linguistics* (1968) 1 EHRR 252, [10]; D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Oxford University Press, 2002), 146.

⁴² *Bekos v Greece* [2005] ECHR 15250/02 [65].

⁴³ See, eg, A. Baker, ‘The Enjoyment of Rights and Freedoms: a New Conception of the ‘Ambition’ under Article 14 ECHR,’ 69(5) *MLR* 714 (2006).

⁴⁴ *Sidabras and Dziautas v. Lithuania* [2004] ECHR 395, *Van der Mussele v Belgium* (1983) 6 EHRR 163

⁴⁵ *Gaygusuz v Austria* (1997) 23 EHRR 364, [42]-[50]; A. Baker, ‘Comparison Tainted by Justification: Against a “Compendious Question” in Article 14 Discrimination,’ [2006] *PL* 475, 488-492.

⁴⁶ *Carson* [2005] UKHL 37 [64]-[76]

⁴⁷ *Belgian Linguistics* (1968) 1 EHRR 252, [4].

⁴⁸ *Abdulaziz v UK* 94 (1985) EHRR 471.

result in a finding of disproportionality: a law that allowed persons above a certain asset threshold (a distinction on the ground of property) to purchase extra votes in general elections, for example, would impose enough social impacts to outweigh a state interest in raising funds. The point is that in applying Article 14 a court must apply proportionality regardless of the ground of differentiation, but will treat discrimination on grounds like race, sex, and sexual orientation as having a presumptively weighty impact.⁴⁹

The ECtHR seldom uses the necessity test when applying proportionality in Article 14 cases, but the tests of legitimate aim and proportionality *stricto sensu* were incorporated into Article 14 justification in *Belgian Linguistics*. The formulation adopted there required ‘proportionality between the means employed and the aim sought to be realized.’⁵⁰ Note that this formulation closely resembles the balancing called for in *Hampson* and *Allonby*. It has subsequently been made clear that Article 14 proportionality requires the rejection of a regulatory distinction that produces ‘harms to other legitimate interests’ disproportionate to the degree to which the measure advances a legitimate aim.⁵¹ This means a balancing between ‘public interests’ on one side and ‘rights interests’ on the other. Jurisprudence of the ECtHR has identified social inclusion and dignity generally, and racial, religious, and gender equality specifically, as common ‘rights interests’ of the Contracting States of the ECHR.⁵² Proportionality therefore contemplates a situation where the harm of a measure, in terms of the extent of invasion of an individual’s rights, or in terms of the damage to common interests in equal dignity and social inclusion, could outweigh the benefits of even a measure that was the least invasive means of securing a significant state interest.

The recent Strasbourg opinion in *Paulik v Slovakia*⁵³ shows the proper approach. There the petitioner complained of the state’s refusal to revisit a prior judicial determination of paternity. In Slovakia those whose paternity had been declared by presumption (based on, for example, marriage to the mother) had access to a procedure to challenge the determination through DNA evidence, while those like the claimant, whose determination was based on a judicial hearing—before the availability of DNA evidence—could not challenge the decision because it was *res judicata*. In this case the ground of discrimination was the status of having had paternity declared in a judicial proceeding. The state sought to defend its rule on the ground that it was necessary—the least restrictive means—to assure legal certainty. The Court, however, applied proportionality, and found that the state’s interest in legal certainty could not outweigh the fact that the claimant had no access to a remedy available to others in similar situations. In doing so the Court observed that ‘the “legitimate interest” in ensuring legal certainty and the security of family relationships and in protecting the interests of children may justify a difference in the treatment of persons with an interest in disclaiming paternity,’ but that in this case the kind and extent of difference in treatment

⁴⁹ See, eg, *Timishev v. Russia*, [2005] ECHR 55762/00.

⁵⁰ *Belgian Linguistics* (1968) 1 EHRR 252, [10].

⁵¹ *A and Ors v Home Secretary* [2004] UKHL 56, [50]; *Ghaidan v Godin-Mendoza*, [2004] UKHL 30, [19]-[20]; *National Union of Belgian Police v Belgium* 1 E.H.R.R. 578, [49] (1975).

⁵² *East African Asians v UK* (1973) 3 EHRR, EComHR; *East African Asians v UK*, Application 4403/70 (1995) 19 EHRR CD1, EComHR; *Thlimmenos v Greece* 31 EHRR 15, 412-414 (2001); *Hoffmann v Austria* 17 EHRR 293.

⁵³ [2006] ECHR 10699/05

was disproportionate to the strength of that interest.⁵⁴ This was true even though the means employed by the state appeared to be the only means available (and hence obviously the least restrictive) to achieve the legitimate aim.

Proportionality in Strasbourg weighs as impacts not only the experiences of the claimant, but societal costs as well. In *Dudgeon v United Kingdom*⁵⁵ the ECtHR found unjustified a law in Northern Ireland that outlawed homosexual sex between consenting adults. Although it resolved the claim on Article 8 grounds (the right to respect for private life), the Court has made it abundantly clear that it views the application of proportionality under Article 8 as equivalent to that under Article 14.⁵⁶ In analysing whether the challenged measure satisfied proportionality, the Court noted that no less restrictive alternatives existed that would meet the state's objectives.⁵⁷ The Court then went on to hold that, 'on the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant.'⁵⁸ Earlier in its opinion the Court had catalogued these effects and commented on the vast number of people affected and the sweeping extent of the effect in terms of the ability of those people to act according to their inclinations. The Court's analysis considered not only the effect of the law on the claimant, but on all homosexuals, and on society as a whole. Proportionality in Strasbourg routinely takes into account impacts not only on the claimant but on the claimant's group, upon society, and upon the general interest in non-discrimination.⁵⁹ Thus there can be no doubt that under Article 14, proportionality means that profound effects of discrimination—assessed beyond the experiences of the claimant alone—can outweigh the benefits even of a measure that represents the least restrictive alternative available to achieve a legitimate aim. By the same token, it means that even unnecessarily invasive acts of government can withstand scrutiny if they do not cause severe detrimental impacts.

Weighting Impacts and the Inverse Brandeis Brief

Unsurprisingly, despite the similarity between the ECtHR proportionality rubric and that resorted to by UK courts to avoid necessity, judges in the UK have not weighed impacts any better under the HRA than under statutory anti-discrimination law. There have been several excellent and important UK decisions⁶⁰ under Article 14 (as well as some real

⁵⁴ Ibid at [58].

⁵⁵ [1981] 4 EHRR 149

⁵⁶ *Evans v UK* [2006] ECHR 6339/05, [74].

⁵⁷ *Dudgeon v United Kingdom* [1981] 4 EHRR 149, [59].

⁵⁸ Ibid at [60].

⁵⁹ *Unal Takeli v. Turkey* [2004] ECHR 29865/96, [59]-[69] (invoking the impact of a rule requiring wives to take on the names of their husbands on the European interest in advancing gender equality); *Smith and another v. U.K.* [1999] ECHR 33985/96, [90]-[94] (cataloguing the impacts of sexual orientation discrimination on homosexuals in the military, including on job prospects); *Sidabras* [2004] ECHR 395, [51]-[61] (noting the long-term impacts of anti-former-KGB-agent ban on the careers and prospects of those affected by it).

⁶⁰ *Ghaidan* [2004] UKHL 30; *A and Ors v Home Secretary* [2004] UKHL 56; *R (Morris) v Westminster CC* [2004] EWHC 2191; *R (Clift) v Home Secretary* [2004] EWCA Civ 514.

stinkers⁶¹), but none have turned on impacts, as opposed to critical (or not) scrutiny of the state's reasons for its measure. The House of Lords recently admitted that courts have not been handling proportionality correctly, and admonished them to take more notice of impacts. In *Huang v Home Secretary*⁶² the Lords took an opportunity presented by an immigration case to point out a gap in the leading UK formulation of proportionality. The pre-HRA case of *de Freitas v Secretary of Agriculture*⁶³ set out a test of proportionality that courts have been applying throughout the life of the HRA, and it asks,

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.⁶⁴

This formulation of course assumes that if means are 'necessary to accomplish the objective,' then they satisfy proportionality, whatever their effects. Unfortunately UK courts have been citing *de Freitas* for years without appearing to notice the missing reference to, well, proportionality (proportionality *stricto sensu*). It seems that under the HRA even necessity as a test has become palatable, so long as it allows judges to avoid assigning a weight to the impacts of government intrusions on rights.

When the discrepancy was brought to their attention in *Huang*, the Lords concisely (dismissively?) cleared it up:

This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in *R v Oakes*, from which this approach to proportionality derives. This feature is the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in *R (Razgar) v Secretary of State for the Home Department*, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality:

"must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage."

⁶¹ *Whaley v Lord Advocate* [2007] UKHL 53; *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; *R (Erskine) v Lambeth London Borough Council* ('*Erskine*') [2003] EWHC 2479 Admin, [32]-[34]; *R (Douglas) v North Tyneside MBC* [2004] HRLR 14; *Adams v The Scottish Ministers* [2003] SLT 366; *Whaley v Lord Advocate* [2004] SLT 425; *A and Ors v Home Secretary* (CA) [2002] EWCA Civ 1502; *R (Pretty) v DPP* [2002] AC 800; *Home Secretary v Hindawi* [2004] EWCA Civ 1309; *R (Mitchell) v Coventry University* [2001] EWHC Admin 167; *R (Montana) v Home Secretary* [2001] HRLR 8.

⁶² [2007] UKHL 11.

⁶³ [1999] 1 AC 69.

⁶⁴ *de Freitas* [1999] 1 AC 69 at 80.

If, as counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good.⁶⁵

As correct as it clearly is, this passage hardly generates optimism, given that it treats the absence of an ‘overriding requirement’ of proportionality from a ‘widely cited and applied’ test as if it requires nothing more than a quick reminder to the courts not to do it again. The opinion says nothing about how the proper balance should be struck, leaving doubt that any great sea change has occurred.

The post-HRA context catches the UK judiciary in a revealing paradox. When the ECJ put judges under pressure to scrutinise justifications of indirect discrimination by asking whether a less discriminatory alternative existed, they resisted this rule-based approach and committed themselves to balancing. When it becomes clear that the ECtHR expects the courts to treat the impact side of the balance as a substantive part of the analysis, the courts retreat from ad hoc balancing and hide behind *de Freitas*-like rules. The circumstances have a single common denominator: UK judges resist robust scrutiny of decision makers, whether private employers or the state. Fortunately for the intelligible evolution of proportionality in UK employment discrimination law, the courts have, at least in word if not in deed, thrown in their lot with the balancing form of proportionality. This means that the Strasbourg teaching is actually more explanatory of and applicable to the proportionality rubric currently intoned by UK judges than is that of the ECJ. If, as I have suggested, the UK courts find their reasoning naturally influenced by the ECtHR authorities—or if they are forced to apply them by advocates who bring Article 14 to bear on employment discrimination cases through the HRA—justification in statutory indirect discrimination cases should turn on impacts as much as on the reasons offered by the employer. Even provisions, criteria, or practices necessary to the achievement of legitimate aims should fail the test if the aim is not compelling or the impacts imposed are too strongly inconsistent with the aims of anti-discrimination law.

For proportionality to come fully into its own, courts must be open to having non-obvious impacts proved to them. It is my contention that advocates on behalf of claimants, and perhaps interveners and *amici*, such as Liberty or the Equality and Human Rights Commission, must demand that UK courts and tribunals turn their attention to the ‘other side of proportionality’ in discrimination cases. The proportionality rubric gives advocates a ground for insisting that a court take into account evidence of impacts. Lawyers in the UK must begin to make what I will call an ‘Inverse Brandeis Brief’ a part of anti-discrimination litigation. At least until UK courts become accustomed to considering the economic, sociological, psychological and other effects of discriminatory laws and policies, advocates must present evidence and research outcomes from these fields of study to demonstrate the degree of impact. Research models exist that could substantiate, for example, the claim that collective bargaining that sacrifices the interests of victims of discrimination to the interests of the beneficiaries of discrimination, because it keeps the union popular with its core members, not only harms the claimants but undermines the interests of gender equality in the workplace, contributes to an unacceptable breakdown of social inclusion, or even has intolerable economic impacts. Courts must be pressured to perform the proportionality analysis the way it reads on the tin, and assign a fair weight to the impacts of discriminatory practices.

⁶⁵ *Huang v Home Secretary* [2007] UKHL 11, [19] (internal citations omitted).

The concept of the Inverse Brandeis Brief draws, of course, from the famous brief filed by Louis Brandeis in the case of *Muller v Oregon*.⁶⁶ At a time when the US Supreme Court was striking down, for example, labour regulation because it constrained the freedom of contract, Brandeis's brief overwhelmed the Court with factual details—statistics, empirical findings, calculations—that supported the legislature's decision to enact a law limiting working hours. Brandeis focused on specifically legislative facts—the fruits of a prospective, general study of the need for such legislation and the consequences of failing to act—to make the point that the legislature was better suited to gathering such facts, and that the courts had no greater ability to comprehend the implications of those facts than the legislature had. The case proved a turning point in the Supreme Court's attitude of deference to Congress, and to this day the Court routinely receives and gives substantial weight to evidence and studies that support challenged legislative measures.

The Inverse Brandeis Brief reverses the original not only by employing empirical evidence to weigh *against* challenged legislation, but by emphasising judicial facts to assist in making a decision for which a court offers the most suitable institutional structure and position. 'Judicial facts' refers to retrospective facts—those which relate to what has actually happened or what is now clearly likely to happen—received in a forum where both sides of the debate have an equal procedural standing, regardless of the number of people that support each side. Judicial facts need not, however, relate exclusively to the individual complainant or to a specific group of complainants. It is true that at first, when a court faces the question whether a claimant has suffered *prima facie* Article 14 discrimination, or statutory indirect discrimination, it should consider only the facts germane to the claimant's situation. However, once *prima facie* discrimination has been found, and the state or the employer claims that its discriminatory measure satisfies a justification defence, the question shifts to proportionality: did the decision-maker, in adopting the challenged measure to meet a stated objective, act proportionately? The burden of this inquiry rests on the state or the employer, and the answer depends upon whether the measure produces harms to equality interests disproportionate to the degree to which it advances a legitimate aim.⁶⁷ Nothing requires or even supports restricting these equality interests to those of the claimant or claimants. Whether a policy or law is 'proportionate' depends on *the policy's* benefits compared to *the policy's* impacts, not merely to those impacts that happened to be felt by the claimant. Ample precedent exists in which UK courts receive and consider evidence of the wider impacts of regulatory schemes,⁶⁸ and some have assumed that ECHR cases would require this kind of evidence.⁶⁹

It might be argued that this logic gets less of a purchase on statutory employment discrimination claims because they typically do not involve the state, and its engagement

⁶⁶ (1908) 208 US 412.

⁶⁷ *Allonby v Accrington and Rossingdale College* [2001] ICR 1189; *A and Ors v Home Secretary* [2004] UKHL 56, [50]; *Ghaidan v Godin-Mendoza*, [2004] UKHL 30, [19]-[20]; *National Union of Belgian Police v Belgium* 1 EHRR. 578, [49] (1975).

⁶⁸ *R(Witham) v Lord Chancellor* [1997] 2 All ER 779 (court swayed by evidence offered by NGO *amicus* about wider public implications of challenged order); *R(Moore) v Preston Supplementary Benefits Appeal Tribunal* [1975] 1 WLR 624 (evidence of actual workings of benefits scheme received).

⁶⁹ *R(Smith) v Ministry of Defence* [1996] QB 517, 564 (in dicta, Henry, LJ opined that a domestically incorporated ECHR would require a 'Brandeis Brief' to deal with difficult cases).

with larger societal interests. Such an argument would be misconceived: statutory anti-discrimination laws represent a public policy decision that, in most cases, the interests of individual businesses, and of economic efficiency generally, must yield to the higher societal priority placed on preventing unequal treatment. When an employer pleads a justification defence or a GOR, the employer claims that its policy is not the kind of situation the statutes seek to prevent. Proportionality does the job of sorting acceptable situations from unacceptable ones. If the impact is proportionate, the measure is by definition not the kind on whose prevention society has placed an overriding priority. Why should this determination not involve consideration of whether this rule or practice, which the employer claims should receive exceptional treatment, brings about the kinds of effects that the statutes seek to eliminate or minimise? Taking account of the aims behind anti-discrimination laws emanating from the EC and domestically, these effects include breakdowns in social inclusion, economic harm from failure to reward merit, racial tension, strains on health and family life, and so on. No possible principle, other than a desire to save judges the work involved, can explain why an employer seeking to use a rule that imposes an indirectly discriminatory impact should not have his or her need for the rule weighed against its social and economic impacts. Courts in the UK applying proportionality should consider evidence relating to societal impacts of challenged measures, just as the ECtHR does.

Although producing a proper blueprint for an Inverse Brandeis Brief will require another paper, some obvious candidates for inclusion present themselves. An Inverse Brandeis Brief should include evidence of the economic and psychological impacts of discrimination, such as imposition of a 'racial tax.'⁷⁰ Ample evidence exists that people subject to discrimination or similar kinds of unfairness suffer stress-related health problems that impose a societal cost which must be weighed against the benefits of the policy in question.⁷¹ Sociological literature offers boundless support for the claim that notorious discrimination and targeting harms the ability of insular minorities to participate economically, and thus undermines social inclusion. All of this information must be presented to the court, which can then give it a weight commensurate with the weight courts have traditionally given to similar kinds of evidence offered in support of challenged state measures.

I anticipate at least four objections to this kind of approach: (1) it will make the amount of evidence courts must consider overwhelming, (2) the UK should wait for Strasbourg to tell it to accept more impact evidence, (3) it is inappropriate for judges to second-guess business decision-makers, and (4) this approach allows judges to make too many value judgments. I will address these in turn. First, relevance as a threshold requirement for the admission of evidence has always been the primary means of preventing a deluge of unnecessary information. If a report on the health impacts of discrimination is relevant to deciding whether a particular employment policy imposes more burdens than are justified by its effectiveness, then it should be admitted, no matter how inconvenient that might be for the employer or for the court. It is simply not a

⁷⁰ R. Kennedy, *Race, Crime, and the Law* 159 (1997).

⁷¹ See, eg, R. DeVogli, J. Ferrie, T. Chandola, M. Kivimaki, & M. Marmot, 'Unfairness and Health: Evidence from the Whitehall II Study' 61 (2007) *Journal of Epidemiology & Community Health* 513; V. M. Mays, S. D. Cochran, and N. W. Barnes, 'Race, Race-Based Discrimination, and Health Outcomes Among African Americans,' (2007) 58 *Annual Review of Psychology* 201-225.

sustainable argument to suggest that relevant evidence should be excluded merely because it is inconvenient.

Second, Strasbourg has had little opportunity to set any precedent for how domestic courts should apply proportionality because of the very distinct roles of the ECtHR and domestic courts. The role of the ECtHR is to supervise the extent to which signatory states comply with their treaty obligations. An underlying principle of the ECHR is that Strasbourg determines the standard to which human rights must be protected, but the Contracting Parties decide how to deliver this level of protection. In other words, the mode of protection of Convention rights is not expected to be the same throughout Europe. From this principle has emerged the doctrine of ‘the margin of appreciation,’ which refers to an area within which Strasbourg defers to the prerogative of the signatory state to strike its own characteristic balance when human rights must give way to overriding state interests.

This does not mean that the ECtHR does not impose limits, it simply means that states are allowed to reach different outcomes when applying proportionality, as long as the outcomes are not outside the margin of appreciation.⁷² As a result, the Strasbourg Court does not really ‘do’ proportionality beyond what is necessary to determine whether the balance struck by the signatory state exceeds the margin of appreciation. In doing so the Court has definitely cited broader societal impacts as grounds for finding challenged discrimination disproportionate.⁷³ The only part of this Inverse Brandeis Brief proposal on which the ECtHR has not provided authority is the acceptability to the courts of social sciences evidence in connection with the weighing of impacts. The actual mechanics of proportionality, however, have always been for the Contracting Parties to sort out, and it is for the state to decide whether the legislature, the judiciary, the executive, or some combination thereof, ultimately strikes the balance.⁷⁴ As discussed above, the HRA has placed the courts in the institutional position of being the final arbiters of compatibility with ECHR rights, and has given them powers and responsibilities which leave them no choice but to make—in cases where this is relevant—independent assessments of the proportionality of challenged measures. Therefore, nothing stands in the way of UK courts paying increasing attention to weighing the impacts of discrimination in a proportionality analysis, and accepting social sciences and health evidence in aid of assigning a proper weight.

Third, courts and tribunals should defer to employer expertise as to what is in the interests of the business or, to an extent, what is necessary for the achievement of a business objective. However, courts are much better placed than employers to evaluate the effects of discrimination. They are institutionally suited to the retrospective fact finding necessary to determine the actual impacts of measures.⁷⁵ Also, it is simply

⁷² Fleshing out the contours of Strasbourg’s margin of appreciation falls outside the scope of this paper. For a thorough discussion, see Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia 2002).

⁷³ *Belgian Linguistics* (1968) 1 EHRR 252, 283.

⁷⁴ See, eg, *Unison v United Kingdom*, [2002] IRLR 497; *Schmidt and Dahlstrom v Sweden*, 1 EHRR 632, paras 34-36 (1976).

⁷⁵ See, eg, O. Fiss, ‘Forms of Justice,’ 93 *Harvard Law Review* 1 (1979), regarding the institutional suitability of courts to the task of weighing public policy concerns against individual rights; but see I. Leigh & L. Lustgarten, ‘Making Rights Real: the Courts, Remedies, and the Human Rights Act,’ 58 *CLJ* 509,

inconsistent with the very concept of preventing discrimination to suggest that an admittedly self-interested business decision made by an employer has more legitimacy than the same decision scrutinised in a forum where there are two parties of equal importance, given equal opportunity to speak and present evidence, and in which decisions are premised on reasoned argument rather than profit motive. Finally, it must be remembered that justification is a defence. The employer wants to use a criterion or practice which imposes disparate impacts. It has placed the matter in controversy by invoking the defence, and must submit to scrutiny of the extent to which the proposed rule comports with society's anti-discrimination policies. If employers (or unions) are left in some uncertainty as to whether a policy they propose to implement is proportionate, it is hard to feel sorry for them. This approach would send out the message that indirectly discriminatory policies should be avoided unless the employer has investigated the impacts and kept them moderate, or has a truly compelling need for the policy.

Fourth, candid engagement in *ad hoc* balancing does not restrain judges any less than rule-like approaches: it simply makes the process transparent. As we have seen, distrust of proportionality, among U.K. judges, has led them either to suppress the ultimate proportionality balancing or to adopt rule-like tests such as those in *Crizzle* or *de Freitas*. However, these tests depend on covert balancing. Deciding what constitutes a legitimate aim requires balancing: *GMB v Allen* might have come out differently in the EAT had the tribunal put a lower weight on the union's 'legitimate' objective in sacrificing the interests of a minority of members to those of itself and its core members. Any time a court concludes that despite the discriminatory effects that result from it, a particular policy is sufficiently reasonable to render it justified (see *Crizzle*), it has used balancing to make a value judgment about what kinds of conduct run afoul of antidiscrimination laws. Accepting and weighing evidence on impacts does not make judicial decision making any more unfettered, it simply makes judges explain the balancing they are engaging in already, and makes it more likely that they will strike the balance in an informed way.

V. Conclusion

UK courts and tribunals, applying the justification defence in statutory indirect discrimination claims, have long interpreted proportionality in a way distinct from that prescribed by the ECJ. Initially, the UK judiciary turned to balancing in order to avoid exposing employers to the harsh scrutiny represented by the ECJ requirement that indirectly discriminatory rules be 'necessary' to meet a 'real need' of the business. This balancing form of proportionality, which weighs the needs of the business against the effects of the indirectly discriminatory measure, closely resembles the proportionality rubric at the heart of the Strasbourg analysis of Article 14 ECHR. In light of this affinity, as well as the HRA's requirement that, in cases where Article 14 applies, domestic statutes be read consistently with the Convention right, the ECtHR jurisprudence on proportionality seems to be a natural source guidance for UK judges applying the justification defence. However, just as they shied away from 'necessity' because of the

522-526 (1999), arguing that judicial review procedures in the UK at the time of the enactment of the HRA were not up to the task of coping with the kind of justification inquiry called for by the HRA.

intensity with which it required them to scrutinise employer's decisions, they resist the Strasbourg approach to proportionality as well. The ECtHR teaching on Article 14 calls for courts to receive evidence on and assign a weight to the impacts of discriminatory policies, and to allow for the possibility that the impacts could outweigh even a measure necessary to meet the employer's aim. The UK judiciary has yet to make this possibility real. For the justification defence in the UK to represent any kind of obstacle to indirect discrimination, it must incorporate the Strasbourg approach to proportionality, and carefully weigh the impacts of challenged measures. To that end, advocates, *amici*, and public interest interveners must offer evidence—reports from the social sciences, economic studies, and even research from the health fields—of the impacts of discrimination, and demand that the tribunals receive and consider them.